IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE NATIONAL BANK OF COMMERCE, of Seattle, a creditor. Appellant, vs. R. E. DOWNIE, Trustee, et. al. Appellees.	No. 1527.
THE SEATTLE NATIONAL BANK, a creditor, Appellant, vs. R. E. DOWNIE, Trustee, et. al. Appellees.	No. 1528.
THE SEATTLE NATIONAL BANK, Petitioner. vs. R. E. DOWNIE, Trustee, et. al. Respondents.	No. 1529.
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APPEAL AND PETITION FOR REVISION AND REVIEW FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Appellants and Petitioners

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The Ivy Press, Second and Cherry, Seattle

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STATEMENT OF THE CASE

In making this statement we refer, except where otherwise specially indicated, to the pages of the addenda in No. 1532.

On April 16, 1907, Arthur Gamwell and Philip Wheeler, partners as Gamwell & Wheeler, were

adjudged bankrupts. (Printed Record, page 10). On the same day R. E. Downie was appointed receiver of their property (p. 11). Thereafter he was elected and qualified as permanent trustee and by an order made June 20, 1907, was authorized to collect all sums of money owing to the bankrupts by the United States Government or any department thereof. (p. 13).

On the 4th day of June, 1907, The National Bank of Commerce of Seattle filed its claim for $37,149.85, setting forth certain securities held by it therefor in the shape of certain claims against the United States Government for goods furnished, assigned by Gamwell & Wheeler to the bank. (p. 18, et. seq.).

On June 18, 1907, The Seattle National Bank filed its claim against the bankrupts for the sum of $22,582.19, with interest, also setting out certain assigned claims against the government as securities for this debt. (Record in No. 1528, p. 17, et. seq.).

Respondents herein filed similar objections to the claim of preference of each bank. (Record in No. 1532, p. 54, et. seq.). (Record in No. 1528, p. 35, et. seq.). Thereafter, on the 10th day of July, 1907, the parties hereto entered into a stipulation as to said assigned claims, which, omitting title and preliminary recitals, was as follows:

"It is hereby stipulated and agreed by and between the Seattle National Bank, by Bausman & Kelleher, its attorneys; the National Bank of Commerce, by Geo. E. de Steiguer, its attorney; R. E. Downie, trustee of the above-entitled bankrupts, by Messrs. Kerr & McCord, his attorneys; the Barber Asphalt Paving Company and the Mukilteo Lumber Company by their attorneys, Peters & Powell and Cooley & Horan, that the facts in relation to the claims against the government of the United States, assigned by said bankrupts to the above-mentioned banks as collateral security for the indebtedness due from said bankrupts to said banks, and to the allowance of which claims as security for such indebtedness the above-named Trustee and the Barber Asphalt Paving Company and the Mukilteo Lumber Company have objected to, are as follows:

"That each and all of said claims against the United States Government, so assigned, were claims for money due from the Government of the United States to the said bankrupts upon account of contracts entered into between said bankrupts and the United States, for the furnishing of materials by said bankrupts to various departments of said Government; that said assignments were each and all voluntarily made in consideration of a loan made by said bank

to said bankrupts at the time of said assignments and as collateral security for the repayment of said loans and without notice to the other creditors of said bankrupts. That all of such assignments were made after the entering into of said contracts and after partial performance thereof by said bankrupts before the allowance of any of such claims or the ascertainment of the amount due thereon, or the issuing of any warrant for the payment thereof, and that none of said assignments were executed in the presence of any witnesses at all, and that none of them recite any warrant for the payment of the claim assigned, and that none of them were acknowledged by any officer having authority to take acknowledgements of deeds, or any other acknowledging officer at all, and that none of them were certified as being acknowledged by any officer. The said loans to each of said banks exceeded in amount the value of said collaterals so assigned to secure the same, and there is now due to each of said banks on account of said loans an amount much in excess of the value of the said collaterals so assigned to each of said banks respectively. The claims of said banks and the objections thereto on file are made a part hereof." (Record in No. 1532, p. 62).

The referee in bankruptcy, on the 22d day of July, 1907, allowed the claim of preference of each bank.

(p. 65). Thereafter the respondents herein, except the trustee, petitioned for a review of the order of the referee (p. 70). Upon this review the judge of the district court allowed the claims of the banks as general debts, but disallowed their claim of preference. (pages 75-79).

The National Bank of Commerce of Seattle has brought this matter to this court, both by appeal, (pages 80-96), and by petition for review (first part of Record No. 1532, pages 3-14).

The Seattle National Bank has also brought the matter here in the same manner. (Record in No. 1528, pages 62-76). (Record in No. 1529, pages 3-13).

SPECIFICATION OF ERROR.

The district court erred in holding that the assignments to the banks were not valid securities, and in rejecting their claim for such securities, and in holding that they were only entitled to the rights of general creditors; for the reason that said assignments were made for a valuable and present consideration, were good under the bankruptcy laws of the United States, were valid as between the parties thereto and as against the creditors of the assignors and the trustee in bankruptcy, and were not invalid under any

provision of the bankruptcy law or Sections 3477 or 3737 of the Revised Statutes of the United States.

ARGUMENT.

The original contention of the respondents was that the assignments to the banks were invalid, because they were in violation of: First, Section 60 of the Bankrupt Act, as amended in 1903; Second, Section 3477 Rev. St. of the U. S.; Third, Section 3737 of the Rev. St. of the U. S.

Under the stipulation of facts, it was admitted that the assignments were made for a present valuable consideration; and from this admission and from the subsequent argument of opposing counsel, we assume that no reliance is placed upon the first objection originally claimed under the bankrupt law.

From the course of the argument made, we also assume that said section 3737 is not relied upon. That section is as follows:

"Sec. 3737. No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party; and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however,

for any breach of such contract by the contracting parties, are reserved to the United States."

In this case there certainly was no assignment of any contract or of any interest in any contracts. If our assignments are good under 3477, they are unquestionably good under 3737.

We, therefore, assume that the real objection which we have to meet is that made under section 3477 Rev. St. U. S. That section is as follows:

"Sec. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments

of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

It is the contention of these appellants and petitioners that the section in question was designed to protect the government, and where there is nothing in the transaction detrimental to the interests of the government, the assignment is good between the parties. It is the contention of the respondents that under the section the assignments are invalid under all circumstances between the parties.

If the assignments were good as between Gamwell & Wheeler and the assignees, they are good as against their creditors and the trustee in bankruptcy. The real question in issue, therefore, is: Could Gamwell & Wheeler, after borrowing the money upon the assignments in question, have collected the assigned claims and withheld the money from their assignees, the banks?

This statute has been subject to examination by the Supreme Court of the United States in many cases.

Spofford v. Kirk, 97 U. S., 484;

United States v. Gillis, 95 U. S., 407;

Erwin v. United States, 97 U. S. 392;
Goodman v. Niblack, 102 U. S., 556;
Ball v. Halsell, 161 U. S. 72;
Freedmen's Saving Co. v. Shepherd, 127 U. S. 494;
Hobbs v. McLean, 117 U. S., 567;
St. Paul & Duluth R. R. v. United States, 112 U. S., 733;
Bailey v. United States, 109 U. S., 432;
Price v. Forrest, 173 U. S. 410.
Nutt v. Knut, 200 U. S. 12.

In the first case cited, Spofford v. Kirk, there was used what has been subsequently alluded to in opinions of the court as strong language. This language must be construed with reference to the facts then under consideration. The case involved the transfer or assignment of a part of a disputed claim then in controversy, and in the opinion it was stated that the facts of the case offered an illustration of the danger of possible combinations of interests and influences in the prosecution of claims which have no real foundation.

Aside from Spofford v. Kirk, a decision which—or the language of which—has been later seriously qualified, the cases above referred to, insofar as it may be contended that they have any application to this case, may be grouped in three classes.

First, we find cases where the assignee endeavors to assert his claim against the government. To this class of cases belong United States v. Gillis and St. Paul & Duluth R. R. Company v. United States. In these cases it appears, both from the title and from the facts stated, that the controversy was between the assignee and the government; and under any construction of the statute, the assignment is invalid as against the government unless the government assents thereto.

The second group of cases includes those wherein the consideration of the assignment is that the assignee shall intervene between the assignor and the government. These cases, so far as cited, are all cases in which a contract is made for the prosecution of a claim and the person undertaking its prosecution is given a lien upon, or assignment of, a portion of the fund to be collected. To this group belong Ball v. Halsell and Nutt v. Knut. It has been admittedly one of the objects of the statute in question to prevent the enlistment of improper influences in favor of a claim against the government, and for this reason the government forbids the intervention of third parties between itself and claimants. In view of this reason for the statute, the assignments involved in these two cases were, as a matter of course,

invalid. The language of these two cases will be discussed further hereafter.

The third group of cases includes those where the controversy is only between the original claimant or his successors in interest, and the assignee, and where it was not a part of the consideration or contract of assignment that the assignee should intervene in any manner between the claimant and the government. To this class of cases belong Goodman v. Niblack, Hobbs v. McLean, Fredmen's Saving Bank Co. v. Shepherd and Price v. Forrest.

In Goodman v. Niblack there was under consideration the validity of a deed of assignment made by the original claimant for the benefit of his creditors, but which assignment contained certain preferences. The controversy arose between the administrator of the original claimant and the person who claimed to be entitled to the preference, the latter being the plaintiff in the suit. The lower court sustained a demurrer to the complaint. The Supreme Court reversed the decree of the lower court and in doing so Justice Miller used the following language:

"It is understood that the Circuit Court sustained the demurrer under pressure of the strong language of the opinion in Spofford v. Kirk. We do not think,

however, that the circumstances of the present case bring it within the one then under consideration, or the principles there laid down. That was a case of the transfer or assignment of a part of a disputed claim, then in controversy, and it was clearly within all the mischiefs designed to be remedied by the statute. Those mischiefs, as laid down in that opinion, and in the others referred to, are mainly two:

"First, The danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction.

"Second, That by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts or the Congress, as desperate cases, when the reward is contingent on success, so often suggest.

"Both these considerations, as well as a careful examination of the statute, leave no doubt that its sole purpose was to protect the government, and not the parties to the assignment."

In Hobbs v. McLean, one Peck had a contract for furnishing the government certain supplies. He as-

sociated certain persons with him upon the agreement that after the contract was completed a settlement of profits and losses should be made on a certain prescribed basis. Later he gave to the two persons in question certain promises to pay certain amounts out of the proceeds of the contract. Peck afterwards became a bankrupt and the suit involved the conflicting claims of his assignee in bankruptcy and his partners and assignees. The court decided in favor of the latter, and in doing so used the following language:

"We are of opinion that the partnership contract was not opposed to the policy of the statute. The sections under consideration were passed for protection of the government. Goodman v. Niblack, 102 U. S. 556. They were passed in order that the government might not be harrassed by multiplying the number of persons with whom it had to deal, and might always know with whom it was dealing until the contract was completed and a settlement made. Their purpose was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed."

The case of Freedmen's Savings Bank Company v. Shepherd involved conflicting claims to a certain amount claimed to be due from the United States

government for rent. One Thompson received an assignment thereof as collateral security on the 21st day of June, 1877 (p. 497). The claim against the company was then in litigation, the case not being decided until the following year. (p. 496). The court sustained the assignment and as part of an elaborate discussion of this Statute used the following language:

"But when the government ascertained the amount of rent due under Bradley's lease, and, with his consent, allowed the same to him for the use of Shepherd, for the use of Taylor, Bacon and Cross, trustees, we perceive nothing in the words or the policy of the statute preventing Thompson from asserting his rights either against the parties or any of them, named in the warrants issued by the government, or against the trust company, the mortgagee of the premises. The object of the statute, as was said in Bailey v. United States, 109 U. S. 432, was to protect the government and not the claimant, and to prevent frauds upon the Treasury; and that 'an effectual means to that end was to authorize the officers of the government to disregard any assignment or transfer of the claim, or any power of attorney to collect it, unless made or executed after the allowance of the claim, the ascertainment of the

amount due thereon, and the issuing of the warrant for the payment thereof.' Here, the officers of the government chose to recognize the assignment, and of their action neither Bradley nor Shepherd, nor Shepherd's trustees, can rightfully complain. The government is acquitted of any liability in respect to the claim for rent, for its officers have acted in conformity with the directions, not only of the original claimant, but of his assignee, Shepherd, and of Shepherd's trustees. The simple question is, whether the money received from the government shall be diverted from the purpose to which Bradley, Shepherd, and Shepherd's trustees agreed in writing that it should be devoted, namely, to the payment of the debts Thompson holds against Shepherd. This question must be answered in the negative; and in so adjudging we do not contravene the letter or the spirit of the statute relating to the assignment of claims upon the United States."

In Price v. Forrest, the following facts, in brief appear: Price, and later his heirs, were about to receive moneys on what had been a disputed claim against the government. Forrest's administratrix secured the appointment of a receiver to take this draft and apply it upon a judgment held by her against Price, and Price was ordered to endorse the

warrant issued for the claim to the receiver. The facts, of course, are very different from those involved in this case, but the following language of the decision is significant:

"There was no purpose to aid those who had claims for money against the United States in disregarding the just demands of their creditors. We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject-matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the government from withdrawing the proceeds of such claim from the reach of his creditors; provided such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the government, nor in anywise obstruct any action that such officers may legally take under the statutes relating to the allowance or payment of claims against the United States."

In the cases of Yorke v. Conde, 147 N. Y., 486, 42 N. E. 193;

Jernegan v. Osborne, 155 Mass., 207, 29 N. E., 520, and

Fewell v. Surety Company (Miss.) 28 So., 755, many of the cases already cited from the Supreme

Court of the United States were reviewed, and in each decision the state court construed them as establishing the rule that assignments of claims against the government were good as between the parties. We refer the court particularly to the first case mentioned, York v. Conde. This case was afterwards taken to the Supreme Court of the United States, Conde v. York, 168 United States, 642, but dismissed for want of jurisdiction.

The case of Bailey v. United States is important in this: It lays down the doctrine that the government may, if it desires, recognize the assignment. In other words, even as between the government and the assignee of a claim the assignment is not absolutely void but voidable only at the option of the government.

The chief claim of the respondents seems to be that since the various decisions of the Supreme Court which we have above cited as sustaining the validity of our securities, and since the review of those decisions by the highest courts of New York, Massachusetts and Mississippi upholding this contention, the Supreme Court of the United States has decided the case of Nutt v. Knut, and in that case held that the assignment was invalid. In that case it appears that an attorney was employed to prosecute a claim

of one million dollars against the United States. It was agreed that he was to receive 33 1-3 per cent. of the amount allowed on the claim, the payment of which was made a lien upon the claim, and upon any draft, money or evidence of indebtedness which might be issued thereon. He was also appointed as an attorney in fact to sign all drafts and vouchers which might be requisite in the prosecution or collection of the claim. The Supreme Court of Mississippi, in an action brought by the attorney, sustained his claim against the administrators of the original claimant, but did not give him any lien upon the claim, and in fact, no lien seems to have been claimed in the state court. The Supreme Court of the United States affirms the judgment of the Supreme Court of Mississippi but in the opinion says the state court erred in holding the contract on its face to be consistent with the statute (Sect. 3477). It is thus apparent that the language of the decision goes beyond the necessities of the case. In addition, it seems that the language of the court is not necessarily inconsistent with what has been decided in previous cases. After alluding to the provisions of the contract hereinbefore referred to, it said:

"All this was contrary to the statute; for its obvious purpose, in part, was to forbid any one who was

a stranger to the original transaction to come between the claimant and the government, prior to the allowance of a claim, and who, in asserting his own interest or share in the claim, pending its examination, might embarrass the conduct of the business on the part of the officers of the government."

By this contract, the attorney was required to intervene between the claimant and the government. As, in the language of the court, the obvious purpose of the act was to forbid anyone so coming between the claimant and the government, the contract was necessarily invalid.

This decision is not materially different from the case of Ball v. Halsell, 161 United States, 72. In the decision of that case the court plainly indicates that one of the objections to such a contract is its champertous nature. Furthermore, the court, on page 79, again alludes to the decision in Freedmen's Savings Bank Co., v. Shepherd, as deciding that the statute does not affect the right of a mortgagee of real estate leased to the United States, or of a pledgee of the rent thereof, to recover from the mortgagors or pledgors the amount of rents paid to them by the United States.

We, therefore, maintain that this latest decision of the Supreme Court of the United States is easily

reconcilable with its prior decisions, where it has held that assignments, such as that involved in this case, are good between the parties.

We submit that the judgment of the district court should be reversed with instructions to allow to these appellants and petitioners the preference claimed by them.

Respectfully submitted,

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GEORGE E. DE STEIGUER,
Attorney for The National Bank of Commerce of Seattle.

The words "void," "null and void," "utterly
id," or "void and of no effect," as used in
atutes relating to transfers of property, are
operly construed as "voidable" only at the
tion of the persons for whose benefit the statute
re enacted.

Words and Phrases, Vol. 8, pp.7336-9.
Toledo R. R. v. Cont. Trust Co., and
cases cited, 95 Fed. pp. 525-9.

See also:

Myers v. Croft, 80 (U.S.) 13 Wallace 291.